ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 99-153
	)	
READING BROADCASTING, INC.	)	File No. BRCT-940407KF
	)	
For Renewal of License of	)	
Station WTVE(TV), Channel 51	)	
Reading, Pennsylvania	)	
	)	
and	)	
	)	
ADAMS COMMUNICATIONS	)	
CORPORATION	)	File No. BPCT-940630KG
	)	
For Construction Permit for a New	)	
Television Station to Operate on	)	
Channel 51, Reading, Pennsylvania	)	

To: Magalie Roman Salas, Secretary
for direction to
The Honorable Richard L. Sippel
Administrative Law Judge

OPPOSITION OF ADAMS COMMUNICATIONS CORPORATION TO "MOTION TO DISMISS ADAMS' APPLICATION, OR ALTERNATIVELY, TO ENLARGE ISSUES (ABUSE OF PROCESS)"

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SUMMARY

The Motion to Dismiss or, in the Alternative, to Enlarge the Issues filed by Reading Broadcasting, Inc. ("RBI") must be denied.

There is no basis for RBI's suggestion that Adams Communications Corporation ("Adams") filed its application for the purpose of entering into a settlement. While a number of Adams principals were also principals of Monroe Communications Corporation ("Monroe"), that fact lends considerable support to the legitimacy of Adams's position here.

Monroe did dismiss its application in return for a substantial payment. But before doing so, Monroe successfully prosecuted its application for approximately 10 years, ultimately receiving a grant based on Monroe's consistent argument that the incumbent renewal applicant was not entitled to any renewal expectancy as a result of that incumbent's adoption of a full-time subscription television format which resulted in the abandonment of locally-oriented programming.

After receiving its grant -- and before that grant became final -- Monroe began the process of constructing its station by negotiating a lease for space on the John Hancock Building in Chicago. Monroe also negotiated for programming with the two then-extant Spanish-language networks. It was only when the availability of Spanish-language programming appeared dubious that Monroe agreed to a settlement proposed by the renewal applicant.

By the time the Adams application was filed, the Commission had changed its rules. As a result, for-profit settlements were strictly forbidden. Adams was aware of that, a fact

which undermines any claim that Adams filed with an intent to settle. RBI claims that the prohibition against settlement might have been waived -- either at the request of an applicant or by the Commission on its own motion (as in fact occurred). But at no time did Adams seek any such waiver, and even when the Commission invited settlement proposals, Adams never proposed any settlement.

RBI also argues that Adams's bona fides are suspect because the Commission had supposedly approved home shopping as a format in the public interest and Adams (according to RBI) took no steps to inform itself of the nature of RBI's programming. As to the first point, contrary to RBI's suggestion, the Commission did not hold that home shopping programming is of such public interest value as to guarantee a renewal expectancy (and thus scare off challengers such as Adams). To the contrary, the Commission held -- as it had held in connection with subscription television -- that the provision of home shopping programming would not *per se* preclude a renewal expectancy as long as the renewal applicant could demonstrate that it had satisfied the Commission's longstanding standards on public affairs programming responsive to local issues. Monroe successfully showed that a subscription television licensee, operating pursuant to the Commission's general approval of subscription television, was not entitled to a renewal expectancy; Adams is confident that it will make the same showing here with respect to RBI's home shopping format.

As to Adams's efforts to inform itself about RBI's programming before the filing of Adams's application, RBI is itself under-informed. In fact, Adams made arrangements to videotape two weeks' of RBI's programming -- 24 hours per day, seven days per week -- prior to the filing of its application, and one Adams principal spoke regularly with the

indivdual in charge of that videotaping in order to learn the contents of the programming being taped.

RBI's other arguments concerning the bona fides of Adams's application are based on nothing more than RBI's self-serving speculation.

RBI also claims that Adams has abused the Commission's processes. Adams denies that claim. With respect to the deposition of Adams principal Milton Podolsky, Adams acted reasonably and promptly in asserting its concern about an apparent conflict of interest. While RBI claims that the relevant section of the D.C. Code of Professsional Responsibility establishes that there was no conflict of interest, in fact the commentary to that section (which RBI elected not to quote in full) supports Adams's view of the matter. Moreover, in view of all of the facts and circumstances, it is clear that no misconduct occurred in connection with the Podolsky deposition.

As to RBI's complaints about various Adams pleadings, Adams stands by those pleadings and strongly believes that they are accurate, amply supported both factually and legally, and well within the bounds of permissible and legitimate advocacy.

Finally, as to RBI's claim of a violation of the *ex parte* rules, Adams does not believe that any violation in fact occurred and, even if such a violation may be deemed, *arguendo*, to have occurred, it was easily and promptly cured with no harm to any party.

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1. Adams Communications Corporation ("Adams") hereby opposes the "Motion to Dismiss Adams' Application, or Alternatively, to Enlarge Issues (Abuse of Process)" ("Motion") filed by Reading Broadcasting, Inc. ("RBI"). The Motion is completely without merit.

2. RBI's Motion consists of two separate strands. First, RBI claims that Adams's application was filed for "speculative purposes" and is therefore not "bona fide". RBI Motion at 3-21. Second, RBI claims that Adams has advanced "false and meritless claims . . . for purposes of delay, harassment and character assassination". RBI Motion at 21-32. In the latter category, RBI also claims that Adams has violated the Commission's *ex parte* rules. RBI Motion at 30-32.

3. As a preliminary matter, Adams notes that RBI's motion seeks either the dismissal of Adams's application or the enlargement of issues. As to RBI's request that Adams's application be dismissed, Adams acknowledges that the Presiding Judge generally has broad authority to regulate the proceeding. However, Adams is not aware of any case in which complaints such as RBI's have led to the summary dismissal of an application. The only authority RBI cites on this point -- *Marlin Broadcasting of Central Florida, Inc.*, 2 FCC Rcd 2025 (Rev. Bd. 1987) involved a case in which one applicant had: failed to exchange a direct written case on an issue specified against her; failed to attend the hearing session at which that issue was to be tried; and had, according to the Presiding Judge, "been absent during the entire hearing." *Id.* Under these circumstances, the Presiding Judge dismissed the non-participating applicant, and that dismissal was affirmed by the Review Board.

4. In the instant case, RBI is not complaining that Adams has failed to participate in the hearing. To the contrary, RBI is complaining that Adams has participated too much in

the hearing. As discussed in detail below, Adams believes that its conduct in this proceeding has been proper in all respects, and that no further inquiry (and certainly no action adverse to Adams) can or should be taken.

I. Adams Did Not File Its Application For The Purpose Of Entering Into Any Settlement, And RBI's Claims To The Contrary Are Themselves Based On Nothing More Than Self-serving Speculation.

5. Stripped of its rhetoric, RBI's claim concerning the supposedly speculative nature of Adams's application is based on one, and only one, fact: that a number of Adams's principals were also principals of Monroe Communications Corporation ("Monroe"), which successfully litigated a comparative renewal proceeding for 10 years, but which ultimately accepted a substantial cash settlement in return for dismissing its application, RBI Motion at 3-8. Adams readily acknowledges the truth of that unremarkable fact.

6. RBI attempts to parlay that fact into something resembling an argument by decorating it with: self-serving expressions of incredulity about Adams's expressed concern about the public interest deficiencies of home shopping programming, RBI Motion at 8-16; incorrect claims (borne of ignorance of the facts) concerning Adams's pre-filing efforts to familiarize itself with RBI's programming, RBI Motion at 8-16; wholly speculative interpretation of certain deposition testimony, RBI Motion at 16-19; and equally speculative reading of fee arrangement letters relating to Adams and Monroe, RBI Motion at 20-21.

A. The Monroe proceeding does not support RBI's suggestion that either the Monroe application or the Adams application was filed for the purpose of settlement.

7. Concerning Monroe, the facts are the facts. Monroe filed an application -- in 1982 -- for Channel 44 in Chicago. As RBI has elicited during its deposition of Adams's officers and directors, the purpose of the Monroe application was to challenge the use of Channel 44 as a "subscription television" ("STV") station airing sexually-related programming. *See* Attachment A. Monroe's principals were (and remain) very substantial businesspersons and community leaders [1/] who were motivated by a common concern about the failure of Channel 44 (which was operating as an STV station offering sexually-oriented programming) to serve the public interest. Monroe proposed to provide free, over-the-air Spanish language programming. *See* Attachment A.

8. Monroe prosecuted its application for approximately a decade -- including two successful trips to the U.S. Court of Appeals for the District of Columbia Circuit. *See In re Monroe Communications Corp.*, 840 F.2d 942 (D.C. Cir. 1988); *Monroe Communications Corp. v. FCC*, 900 F.2d 351 (D.C. Cir. 1990). After its application was granted by the Commission in 1990, Monroe made final arrangements for a transmitter site atop the John

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[1/] Résumés of Monroe/Adams principals are included as Attachment B hereto. Those principals include the founder of the Alberto-Culver company (Robert Haag); the former chief executive officer of the J. Walter Thompson Company (Wayne Fickinger); the President of RHC/Spacemaster Corp. (A.R. Umans); the founder of Shelby-Williams Company (Manfred Steinfeld); and a senior partner in a prominent Chicago law firm (Howard N. Gilbert). Alberto-Culver and J. Walter Thompson are both public corporations whose stock is traded on the New York stock exchange, as was, until very recently, Shelby-Williams; RHC/Spacemaster is a substantial privately-held corporation.
Mr. Gilbert's documented interest in the public interest obligations of broadcast licensees extends over almost 50 years. *See* Attachment to Attachment A ("Newspaper-Radio Joint Ownership: Unblest be the Tie that Binds", 59 Yale L.J. 1342 (1950), a law review note authored by Mr. Gilbert while a law student in 1950).

Hancock Building in Chicago and engaged in substantive negotiations with the only two Spanish-language programming networks then in operation so that Monroe could implement its nearly-decade-long proposal to provide free, over-the-air Spanish language programming to Chicago. However, after extensive discussions with one of those two networks, that network underwent an ownership change and the network unilaterally ceased its negotiations with Monroe. Monroe learned that the second Spanish network was at that time on the verge of bankruptcy and, in fact, it did shortly thereafter go into bankruptcy.

9. As a result of these developments, Monroe became legitimately concerned about its ability to realize its proposed Spanish-language station. At that same time, Monroe was approached by the incumbent renewal applicant, which offered Monroe a substantial settlement. [2/] Particularly in view of the doubtful availability of Spanish-language programming, Monroe reluctantly accepted that settlement offer.

10. Contrary to RBI's claim (RBI Motion at 7), nothing in the history of the Monroe proceeding provides ***any*** support at all for RBI's speculation that the Monroe principals were acting, or that the Adams principals are acting, out of an "intent to file applications for speculative purposes." To the contrary, Monroe fought for a decade to obtain a permit and, having finally succeeded in that goal, had taken substantial steps (including the difficult process of final negotiations of a lease for an antenna site in downtown Chicago, as well as negotiating for programming) toward construction even while the grant of its permit was still subject to appeal. Only after events outside of Monroe's

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[2/] Importantly, Monroe was approached by the incumbent -- Monroe did ***not*** initiate any settlement discussions.

control created a substantial threat to its ability to provide the programming service it had proposed did Monroe agree to settle. Nothing in Monroe's history supports the notion that Monroe filed its application for the purpose of settlement. [3/]

B. No basis exists for RBI's speculation that Adams filed its application with the intent to enter into a settlement.

11. RBI speculates that, because Monroe accepted a substantial payment in settlement of the Channel 44/Chicago proceeding, Adams must have known, "when it filed its application for Reading, that settlement was a possible outcome." RBI Motion at 4. That speculation, however, is flatly inconsistent with Commission's own rules and policies. As even RBI acknowledges, the Monroe proceeding belonged to a very limited class of cases in which a dismissing applicant was permitted to receive payment exceeding its reasonable and prudent expenses. RBI Motion at 5-6. But, also as RBI acknowledges, by 1994 (when the Adams application was filed), the Commission's rules had been amended to preclude for-profit settlements. RBI Motion at 7. [4/]

[3/] The Monroe case is distinct from *Garden State Broadcasting, Ltd. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993). There an initial application -- filed by Mainstream Television Limited Partnership ("Mainstream") -- for the license of Channel 9, Secaucus, New Jersey, was dismissed through a settlement approximately one year after it was filed, and before it was designated for hearing. Here, by contrast, the Monroe application was prosecuted through a hearing and subsequent appeals in which Monroe prevailed and its application was granted. Monroe thereupon initiated the construction process, only to encounter, after the passage of ten years following the filing of its application: (a) substantial changes in the availability of programming and (b) a very substantial settlement offer from the incumbent renewal applicant.

[4/] *See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780, 66 R.R.2d 708 (1989), *recon. denied*, 5 FCC Rcd 3902, 67 R.R.2d 1515 (1990). The post-1989 rules further provided that ***no*** settlement resulting in payment of ***any*** amount to a dismissing applicant would be approved prior to the conclusion of the

(continued...)

12. In other words, regardless of what had happened in the Monroe proceeding, at the time the Adams application was prepared and filed, the Commission's own rules absolutely precluded for-profit settlement. Adams was well aware of that prohibition and had no reason to believe that that prohibition would not apply to Adams's application. *See* Attachment A. [5/]

13. Acknowledging this fatal flaw in its argument, RBI resorts to fantasy. According to RBI, "the Commission is always free to waive or modify its rules." RBI Motion at 7. [6/] That is true, but in the context of this case it is meaningless: Adams has never sought, or even contemplated seeking, any such waiver or modification. *See* Attachment A.

14. Adams's lack of interest in settlement is further illustrated by the fact (which RBI itself notes) that, since 1994, the Commission has on its own motion afforded opportunities for for-profit settlements. RBI Motion at 7, citing the Commission's 1995

[4/](...continued)
hearing, and that even ***after*** the hearing, a dismissing party could receive no more than reimbursement of its reasonable and prudent expenses, *i.e.*, no for-profit settlement was permitted. *Id.* Those rules were in effect at the time Adams filed its application in 1994. *See* 47 C.F.R. §73.3523.

[5/] The change in the settlement rules provides yet another distinction between this case and *Garden State*. In *Garden State*, following the dismissal of the Mainstream application (*see* Footnote 3, above), the principals of Mainstream formed a second company which filed a second application for the Channel 9/Secaucus license in December, 1987 -- more than a year before the Commission announced that for-profit settlements would be prohibited. Here, by contrast, Adams's application was filed several years ***after*** that prohibition was adopted, and Adams's principals were aware that that prohibition was applicable to their application.

[6/] As the Enforcement Bureau observes in its Comments on the RBI Motion, the Commission has in fact waived the limit on for-profit settlements. *See* Bureau Comments at 5, n. 7, citing *EZ Communications, Inc.*, 12 FCC Rcd 3307 (1997). But that waiver occurred three years ***after*** the filing of Adams's application, and was based largely on statutory developments -- most notably, the Telecommunications Act of 1996 -- which ***also post-dated by years*** the filing of Adams's application.

waiver of limitations on settlements. If -- as RBI erroneously supposes -- Adams were truly determined to exact some settlement, Adams could have sought to take advantage of those Commission-provided opportunities. But even when for-profit settlements were permitted, Adams did ***not*** propose any such settlement. In fact, Adams has ***never*** approached RBI -- or anyone else -- seeking to settle this case, nor does Adams have any intention of doing so. *See* Attachment A. [7/]

15. RBI also speculates that "experienced communications counsel could be expected to suggest creative settlement arrangements . . . in the event a waiver were not available." *Id.* This wild claim illustrates how far-fetched RBI's argument is. RBI relies not on what Adams (or any identified person associated with Adams) actually did or said; rather, RBI posits some imaginary "experienced communications counsel" who "could be expected to suggest" some undescribed "creative" mechanism to avoid the Commission's clearly-worded prohibition. RBI's inability to muster anything more substantial than this exercise in pure speculation and surmise underscores the Motion's utter lack of merit.

C. Adams's concern about RBI's programming is legitimate.

16. RBI argues that Adams's bona fides are suspect because, according to RBI, Adams could not have been sufficiently familiar with RBI's programming to determine whether RBI was "rendering a service to the community". RBI Motion at 8-14. But it is well-established that, for some eight years leading up to the 1994 of Adams's application,

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[7/] RBI's argument on this score is a classic case of projection (as psychiatrists say). While Adams has never sought any settlement, ***RBI*** has offered to pay Adams to dismiss the Adams application. Adams summarily rejected RBI's offer.

RBI had been providing a home shopping format. Adams's principals have uniformly testified that they chose to challenge RBI's renewal because they do not, and did not, believe that the home shopping television format serves the public interest. *See* RBI Motion at 8-12. [8/]

17. RBI chooses not to believe Adams's uncontradicted testimony. RBI's incredulity is said to arise from the fact that, in 1993, the Commission decided that home shopping programming should be entitled to "must-carry" rights. *Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5321 (1993); RBI Motion at 12-14. If the Commission thought home shopping was in the public interest, reasons RBI, how could Adams have thought differently? Also, RBI claims that Adams made no effort to determine the programming of Station WTVE(TV) (other than to ascertain that it was a home shopping station).

1. Contrary to RBI's suggestion, the Commission has NOT held that stations offering a full-time home shopping format are by definition serving the public interest and are therefore immune from challenge.

18. With respect to whether or not Adams could reasonably believe home shopping to be subject to challenge, RBI misses several crucial points. If the home shopping format were, in fact, unquestionably in the public interest, then Congress would not have bothered to order the Commission to undertake an inquiry into whether that format warrants cable

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[8/] This further distinguishes the instant case from *Garden State*. In *Garden State*, the decision to file the second challenge application was made less than a month after the licensee had been in control of the station, and the nature of that new licensee's programming could not have been known to the challengers when they decided to mount their challenge. Here, by contrast, RBI had been providing a programming format of questionable merit for years prior to the filing of the Adams application. Adams was aware of that format and specifically targeted Station WTVE(TV) for that reason.

must-carry rights. The fact that Congress ***did*** mandate such an inquiry (*see id.*) establishes that a substantial question exists concerning the supposed public interest attributes of home shopping programming -- so substantial a question, in fact, that a majority of Congress was unable to answer that question for itself. This supports Adams's expressed skepticism about the public interest validity of home shopping.

19. RBI also quotes a limited portion of the Commission's home shopping decision (*see* RBI Motion at 13) for the proposition that home shopping stations may serve the public interest. The seeming purpose of this quote is to establish that home shopping stations have been found to be *per se* serving the public in such a way as to completely immunize them from effective challenge.

20. But RBI neglects to provide the full context leading up to that quoted portion. On the page (8 FCC Rcd at 5327, ¶31) preceding the portion quoted by RBI, the Commission was far more cautious than RBI lets on:

> Based upon the record before us [9/], it appears that the chosen format of home shopping stations generally does not preclude them from adequately addressing the needs and interests of their communities of license. We observe that we have never denied the license renewal application of any home shopping station, thus indicating that these stations have been able to meet the Commission's standards on public affairs programming responsive to issues confronting the local community, as well as standards on indecency and political or emergency broadcasting. Indeed, with regard to serving the needs and interests of children, as with all public interest considerations, home shopping stations must comply with the same rules that apply to other television broadcast stations.

9/ The record which was before the Commission included evidence of at least one group licensee whose home shopping stations aired four hours of nonentertainment programming -- including news updates and live local election coverage -- on Sundays, over and above a 4.5 minute, locally-produced program which aired every hour through the rest of the week. *See* 8 FCC Rcd at 5327, ¶29.

In other words, while the home shopping format may not have been *per se* contrary to the public interest, that format did not in and of itself constitute compliance with the Commission's well-established "standards on public affairs programming responsive to issues confronting the local community." Thus, in Adams's view stations providing a home shopping format were clearly still subject to legitimate challenge.

21. The Monroe proceeding sheds light on Adams's position here. As noted above, Monroe challenged the operation of an STV station. As with home shopping, the Commission had, prior to the filing of Monroe's application, concluded that the STV service was not contrary to the public interest. *See, e.g., Subscription Television Service*, 90 FCC2d 341, 51 RR2d 1173 (1982). Accordingly, effective August, 1982, the Commission specifically authorized stations to operate full-time in an STV mode, much as the Commission has done with respect to the home shopping format. *Id.* But such STV authorizations carried with them an important caveat: STV stations were still required to comply with their obligation to serve the public with locally-oriented, locally-produced nonentertainment programming. *Video 44*, 5 FCC Rcd 6383, 68 RR2d 503 (1990), *recon. denied, Video 44*, 6 FCC Rcd 4948 (1991). In the Monroe case, the Commission concluded that the incumbent STV operator had failed to meet that obligation, and that Monroe's application was therefore comparatively superior. *Id.*

22. From their experience in Monroe, the Adams principals were (and are) well-justified in their belief that home shopping stations are not immune from effective challenge just because the Commission may arguably have "approved" in some indirect, general

fashion the home shopping format. [10/] Notwithstanding RBI's self-serving claims of incredulity, Adams's decision to challenge RBI's home shopping station is in fact totally credible.

2. Contrary to RBI's uninformed claims, Adams took extensive steps to inform itself about RBI's programming prior to filing its application.

23. RBI also claims that, because none of Adams's principals spent extensive time in Reading, they could not be familiar with RBI's programming and therefore could not have formed a bona fide intent to replace that programming with programming which would, in Adams's view, be superior. RBI Motion at 8-14.

24. But RBI is unaware that, prior to the filing of Adams's application, Mr. Gilbert (on behalf of Adams) hired a number of individuals to videotape the programming of Station WTVE(TV) for two weeks, 24 hours per day, seven days per week. *See* Attachment A. As that taping project was on-going, Mr. Gilbert spoke regularly with the person who was in charge of making the tapes, and was regularly briefed on the contents of the programming being taped. The information which Mr. Gilbert obtained through those reports confirmed his belief that the station was not serving the public. Again, the taping was undertaken -- and Mr. Gilbert's briefings concerning the programming occurred -- ***before*** the filing of Adams's application. RBI is just plain wrong in stating that Adams made no effort to determine the contents of the station's programming. In fact, Adams's made

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[10/] Adams notes that it is not alone in its assessment of home shopping as a questionable form of programming. In a meeting of RBI's board of directors in June, 1995 -- two years ***after*** the Commission's decision on which RBI leans so heavily -- RBI's dominant principal, Micheal Parker, himself referred to "shopping stations" as having "a difficult time qualifying as legitimate forms of programming entitled to must carry." *See* Attachment C.

extensive efforts to do so prior to the filing of its application, and on the basis of those efforts, Adams was confident that RBI's home shopping format was not serving the public interest. [11/]

D. RBI has offered no other support (other than its own self-serving speculation) for its claims concerning Adams's supposed intent.

25. RBI also claims that the "timing" of certain "significant events" is "highly probative" of Adams's "real motive and intent". RBI Motion at 15-16. The totality of this "highly probative" showing amounts to the observation that Adams was not formed until months after the resolution of the Monroe case, and Adams's application was not filed until more than a year after that resolution. Again, RBI is engaging in nothing more than wishful thinking. ***Nothing*** about the sequence of events noted by RBI establishes ***anything*** about Adams's "motive" or "intent". [12/]

[11/] As it turns out, through a misunderstanding with the person charged with responsibility for the videotaping, the programming which was actually taped was that of the Home Shopping cable channel, as opposed to the over-the-air signal of Station WTVE(TV). Adams did not become aware of that fact, however, until September, 1999, several months ***after*** this hearing commenced. In other words, at the time Adams filed its application it believed that it had a reasonably detailed knowledge of the station's programming. While the cable channel programming may have been distinct in certain respects from the station's, review of the station's programming records in connection with this hearing supports the conclusions formed by Adams about the station's programming prior to the filing of Adams's application. For example, RBI had shut down its local television studio facilities and had ceased originating any local live programming of any sort. The incumbent licensee in the Monroe case had similarly shuttered and mothballed its local studio facilities -- resulting in a permanent reduction in the type of programming by which the Commission has traditionally evaluated claims of renewal expectancy. *See Video 44*, 5 FCC Rcd 6383 at ¶18.

[12/] The timing here also distinguishes this case from *Garden State*. In *Garden State*, the second challenge company was formed less than a month after initial settlement, the purpose being to file yet another application for the same station even though the challenging principals did not then know what the station's programming consisted of. Here, Adams was formed approximately a year after the Monroe settlement was approved by the Commission, and Adams's purpose was ***not*** to mount a repetitive challenge for the Channel 44/Chicago license, but rather to challenge the renewal of home shopping stations having a *modus operandi* similar to the incumbent in *Video 44* insofar as the abandonment of local programming was concerned.

26. RBI grasps at similar straws when it claims that "Adams' investors viewed [Adams's] application primarily as an investment opportunity". RBI Motion at 16-19. This claim is based on the RBI's juxtaposition of two facts: first, that A. R. Umans, a less than 10% shareholder in Adams, did not have exhaustive and detailed knowledge of the genesis of Adams's programming proposal; and second, that Mr. Umans sought to clarify the precise amount of his ownership in Adams. *Id.* While Mr. Umans testified that he did not know the extent of the Hispanic population in Reading, Mr. Umans did confirm that Adams intended to provide Spanish-language programming, and that he had discussed that proposal with Messrs. Haag and Gilbert (who, together, control a majority of Adams's stock). Mr. Umans's testimony was consistent with what might ordinarily be expected of a less-than-10% shareholder.

27. As to Mr. Umans's ownership interest, some documents produced by Adams during discovery revealed that Mr. Umans had questioned whether his ownership percentage in Adams was 9.0% or 8.7%. *See* RBI Motion at 18-19. It is not unusual for businesspeople to monitor their ownership interests in order to confirm exactly what they own. Yet, according to RBI, Mr. Umans's conventional interest in keeping the record straight was really an indication that Mr. Umans was already counting his share of whatever lucrative settlement payment Adams would be receiving. RBI offers no basis (other than its own imagination) for this conclusion. Importantly, RBI ignores the more likely possibility that Mr. Umans may really have been calculating what his share of an Adams-operated station on Channel 51 in Reading would be worth. In any event, RBI's claims are nothing more than pure speculation.

28. RBI also acknowledges that it has no evidence at all of any discussions among the Adams principals concerning possible settlement. RBI Motion at 19. Rather than acknowledge that this deficit undermines its claims, RBI creatively asserts that that deficit is the result of a conspiracy by Adams ***not*** to have such discussions, because discussions about settlement would have been "dangerous". *Id.* RBI's self-serving assertion is completely without factual support. Adams's principals never discussed possible settlement because Adams did not contemplate seeking, or entering into, any settlement. *See* Attachment A.

29. Finally, RBI claims that the fee arrangement letters between Bechtel & Cole, Chartered ("B&C") and (a) Monroe and (b) Adams provide "substantial evidence" that Adams filed its application "for speculative purposes". RBI Motion at 20-21. The Presiding Judge has already had the opportunity to review the letters in question and has already declared them to be irrelevant to the issues in this case, *Memorandum Opinion and Order*, 99M-71, ¶5, released November 1, 1999.

30. Again, RBI is engaging in self-serving, unfounded speculation.

II. Adams Has Not Engaged In Any Abuse Of Process.

31. Shifting gears, RBI next assails Adams for allegedly abusing the Commission's processes in various ways. The primary elements of RBI's attack are that: (a) Adams raised a question of a possible conflict of interest in connection with the deposition of Adams principal Milton Podolsky; (b) Adams has filed a number of pleadings which RBI believes to be meritless; and (c) Adams has supposedly violated the *ex parte* rules. None of these claims has any merit at all.

A. The Podolsky deposition

32. On October 15, 1999, immediately prior to the commencement of the deposition of Mr. Podolsky, counsel for Adams advised counsel for RBI that Adams understood that a potential conflict of interest existed which would require the withdrawal of Holland & Knight, RBI's counsel. [13/] This was based on information provided to Adams's counsel by Mr. Podolsky that morning.

33. According to Mr. Podolsky, Mr. Podolsky and his diverse real estate interests had been represented in Florida (the site of Holland & Knight's principal office) since 1980 by an attorney whose practice had been merged into Holland & Knight. [14/] Mr. Podolsky advised Adams's counsel and Mr. Gilbert that Mr. Podolsky was a general partner in a real estate venture which owned an industrial building in Florida which had been represented by Holland & Knight within the preceding several months. Mr. Podolsky also stated that he had made available to Holland & Knight his personal balance sheet or net worth statement in connection with that firm's representation of him and his interests in refinancing the industrial property.

34. When these matters were presented to counsel for RBI, counsel for RBI

[13/] Adams's counsel had first heard of this potential conflict at a breakfast meeting held on October 14, 1999. However, almost immediately after that matter was raised, Mr. Podolsky received a telephone call advising him that his wife, who had already been in a hospital intensive care unit for 27 days in connection with infections arising from treatment for cancer, had begun to bleed. Mr. Podolsky immediately excused himself from the meeting and spent the rest of the day with his wife at the hospital. As a result, he was unavailable for further consultation until October 15, 1999, the day of his deposition. *See* Attachment D.

[14/] Since Holland & Knight did not appear before the Commission on behalf of RBI prior to July, 1999, it may reasonably be concluded that Holland & Knight's representation of Mr. Podolsky preceded, by a long shot, its representation of RBI.

confirmed that some question of potential conflict did indeed exist: according to RBI's counsel, the question had been sufficient to warrant consideration by Holland & Knight's ethics committee, although no one at Holland & Knight had deigned to notify Mr. Podolsky of the existence of such a question. That fact alone establishes that Adams's concern about a potential conflict was far from frivolous.

35. RBI now complains that Adams was unwilling to accept as dispositive the high-handed determination by the Holland & Knight ethics committee that no real conflict existed. RBI Motion at 22-23. The problem with RBI's position is that counsel for RBI was not able to produce -- and has still not produced -- any written analysis by that ethics committee setting forth the facts as it understood them or the ethical considerations -- whether under the District of Columbia canons of ethics or those of Florida -- which it had considered in reaching whatever decision it may have reached. Indeed, during the colloquy on October 15, 1999, counsel for RBI was unable to explain with any specificity exactly what the facts were (as he understood them) or what the law was. Instead, he insisted that Adams accept as binding his oral representation that his firm's ethics committee had somehow determined that no conflict existed, even though that determination had never been committed to writing.

36. Under these circumstances, Adams believed it was fully justified to take appropriate steps to protect itself and Mr. Podolsky from what it perceived to be a serious question of potential conflict of interest. Adams's concerns were expressed to the Presiding Judge in the transcribed telephone conference (the transcript of which is included as Attachment F to the RBI Motion).

37. Immediately following that telephone conference, counsel for Adams conferred with Mr. Podolsky and Mr. Gilbert concerning the nature of the interests represented by Holland & Knight. [15/] As counsel and Mr. Gilbert pressed for specific details, it became apparent that Mr. Podolsky's recollection of those details was not completely reliable. Accordingly, Mr. Podolsky, Mr. Gilbert and counsel contacted Phyllis Garay, an executive in Mr. Podolsky's Chicago-area office, to verify the precise nature of Mr. Podolsky's interests. Ms. Garay advised that the particular real estate interest in question, located in Deerfield Beach, Florida, was owned by Deerpod Associates, Ltd. *See* Attachment E. Ms. Garay stated that, contrary to what Mr. Podolsky had advised counsel and Mr. Gilbert earlier that morning, Mr. Podolsky was not a partner in Deerpod Associates, Ltd. ("Deerpod"). [16/]

[15/] In its Motion, RBI suggests that, rather than move to disqualify Holland & Knight, Adams should simply have requested a delay to check out the facts and the law. RBI Motion at 23-24. That might have been appropriate, had counsel for RBI presented to Adams a written memorandum from the Holland & Knight ethics committee setting forth the facts and law which that committee believed relevant. With such a memorandum in hand, Adams could have "checked" the facts and law as Holland & Knight understood them. But no such memorandum was provided, leaving Adams with only the preliminary information which Mr. Podolsky had provided. Since RBI acknowledged that Holland & Knight had itself determined that enough of a potential conflict existed to warrant scrutiny by its ethics committee, Adams had reason to believe that Mr. Podolsky's information was accurate.

[16/] Mr. Podolsky's misstatement of his interests is understandable. Ms. Garay has since advised Adams that there are two general partners of Deerpod (Mipod, Inc. and the Jerold E. Podolsky Revocable Trust) and six limited partners (the Lois Podolsky Revocable Trust, the Bonnie Podolsky Family Trust, the Randy Podolsky Family Trust, the Steven Podolsky Family Trust, the Jerold E. Podolsky Revocable Trust, and the Podfund 1988 Limited Partnership). According to Ms. Garay, Mr. Podolsky is the president and a director of Mipod, Inc., one of the two general partners of Deerpod. Additionally, he is, through the Milton Podolsky Revocable Trust, a 25% shareholder in Mipod, Inc. Further, as evidenced by the need to furnish his financial statement in order to obtain financing, Mr. Podolsky was in fact a party in interest to the transaction and a real client of Holland & Knight.

In light of the relatively complex structure of Deerpod and Mr. Podolsky's significant roles in

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38. With that information in hand, within no more than 30 minutes of the telephone conference call with the Presiding Judge, counsel for Adams sought out counsel for RBI in order to advise him of the misunderstanding. However, counsel for RBI had left the building. In order to avoid any undue disruption or delay arising from that misunderstanding, counsel for Adams then prepared a "Notification of Withdrawal of Objection to Representation of RBI by Holland & Knight" ("Withdrawal Notice") which he caused to be served on all parties and the Presiding Judge from Chicago that very afternoon. In the Withdrawal Notice, counsel explained the misunderstanding, apologized, and expressed Adams's willingness to pay for the additional costs of transportation and lodging which might be necessary to complete the depositions.

39. RBI would now hang, draw and quarter Adams because of this sequence of events. In its Motion, RBI quotes extensively from Rule 1.7(b) of the D.C. Rules of Professional Conduct and the commentary relative thereto. [17/] According to RBI, "the situation was not even a close case". RBI Motion at 25. [18/]

40. But there is a problem with RBI's quotation -- it stops just a bit too soon. RBI

16/(...continued)
the Deerpod operation, his misstatement about those roles is understandable. This is especially so in view of the fact that, as noted above, Mr. Podolsky was at the time clearly distracted by his wife's medical condition.

17/ While counsel for RBI and counsel for Adams both practice in the District of Columbia, it should be noted that Holland & Knight's principal office is in Florida, where the representation of Mr. Podolsky apparently occurred. Thus, Florida ethical considerations might well be deemed also to be applicable to Holland & Knight's conduct.

18/ Of course, RBI did not provide these citations during the October 15, 1999 telephone conference, nor did RBI provide any detailed explanation of its understanding of the relevant facts at that time.

quotes the commentary, emphasizing with bold-face type the following sentence which concludes the portion quoted by RBI:

> [T]he lawyer for an organization normally should not be precluded from representing an unrelated client whose interests are adverse to the interests of an affiliate (*e.g.*, parent or subsidiary), stockholders and owners, partners, members, etc. of that organization in a matter that is separate from and not substantially related to the matter on which the lawyer represents the organization.

RBI Motion at 25-26, quoting the commentary to Rule 1.7.

41. By quoting that portion alone, RBI clearly attempts to create the impression that the applicable rule is clear and unbending. Not so. ***Immediately after*** the quoted portion, the commentary continues:

> However, there may be cases in which a lawyer is deemed to represent a constituent of an organization client. Such de facto representation has been found where a lawyer has received confidences from a constituent during the course of representing an organization client in circumstances in which the constituent reasonably believed that the lawyer was acting as the constituent's lawyer as well as the lawyer for the organization client. [citation omitted] In general, representation may be implied where on the facts there is a reasonable belief by the constituent that there is individual as well as collective representation. [citation omitted] . . . [A]bsent consent under Rule 1.7(c), such adverse representation ordinarily would be improper if:
>
> * * *
>
> (b) during the course of representation of the organization client the lawyer has in fact acquired confidences or secrets (as defined in Rule 1.6(b)) of the . . . constituent that could be used to the disadvantage of any of the . . . constituents.

A copy of Rule 1.7 and the commentary thereto is included as Attachment F hereto. [19/]

[19/] Adams also notes that, because the question of potential conflict did not arise until the day of the deposition, in Chicago, Adams's counsel did not have the opportunity to undertake substantial legal research prior to the telephone conference, and did not have on hand for ready review copies of any ethical rules -- whether from the District of Columbia or Florida.

42. Adams is not here seeking a determination by the Presiding Judge concerning the particular ethical question which was presented on the morning of October 15. But Adams does believe that, at an absolute minimum, the relevant facts and applicable guidelines establish that Adams had a legitimate basis on which to raise the conflict question and that Adams acted properly in so doing. This is particularly so because Mr. Podolsky advised Adams's counsel that Mr. Podolsky had provided a copy of his balance sheet to Holland & Knight. During the depositions of Adams's principals on October 14, RBI's counsel had specifically sought to obtain copies of their balance sheets; Adams declined to provide them. [20/] Under the commentary to Rule 1.7 quoted above, that fact alone gave rise to a serious question of potential conflict. In any event, so that the record is clear, Adams did ***not*** interpose its objection concerning the representation of Holland & Knight for delay, harassment, or any other improper purpose.

43. In view of the foregoing, the circumstances surrounding the Podolsky deposition do not warrant any further consideration here. [21/]

[20/] RBI acknowledges this, but claims that this is just a "concoct[ion]" by Adams. RBI Motion at 26, n. 9. According to RBI, Adams bears the burden of explaining how the availability of Mr. Podolsky's balance sheet "might be adverse" to Adams. *Id.* But in the context of the instant proceeding, RBI is not entitled to have access to that balance sheet. RBI has indicated an interest in obtaining such access (as evidenced by RBI's questioning during the Adams's principals depositions on October 14) -- the basis of that interest is not clear, but the fact of the interest is unmistakable. Under these circumstances, RBI should not be permitted to take advantage of the fact that that balance sheet may have been provided to Holland & Knight, by Mr. Podolsky, under the assumption that Holland & Knight was Mr. Podolsky's counsel, not RBI's. At a minimum, Holland & Knight should provide written confirmation of any steps which have been taken to erect an iron curtain around Mr. Podolsky's files, in order to prevent any inappropriate review of and reliance on those files in the instant litigation.

[21/] Adams is constrained to note that, while RBI claims that the Podolsky matter "delay[ed] the case", RBI Motion at 27, the fact is that Adams acted as promptly as possible under the circumstances

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